



NEWS FOR NEUTRALS

A monthly newsletter for members of the Court's
Civil Mediation & Judicial Arbitration Panels

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Volume 1, Issue 1

July 2010

Mediators: New "3-Hour" Policy

On March 18, the Court held a Recognition Ceremony to acknowledge your generous service on the Panel. Now it's time for a small but more concrete acknowledgement of that service, which often requires far more than 3 hours per case.

New Policy

Panel members provide 3 hours of mediation services at no charge to the parties in court-ordered mediation. After 1 hour of pre-mediation services, as described below, and 2 hours of actual mediation, panelists may bill the Court \$150 and may bill the

Continued on pg. 2

**Revised [ADR Local Rules, Title 4](#),
effective July 1, 2010**

Arbitrators: Policy on Pre-Arbitration Settlement Discussions

All judicial arbitrations must result in an Arbitration Award or a Notice of Settlement filed by the parties within the timeline for filing the Award.

A mediator's Statement of Agreement or Non Agreement does not satisfy this requirement.

The [Arbitrator's Fee Statement](#) cannot be approved unless the Award or Notice of Settlement has been filed. Therefore, if the case settles at the arbitration, the arbitrator must tell the plaintiff to (1) file the Notice of Settlement within the timeline for filing the Award and (2) include the arbitrator on the proof of service.

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Upcoming Events:

- **Civil Mediation Panel Brown Bag Lunch**
 - July 29; 12 – 1:15 p.m.
 - Historic Courthouse, Executive Office Conf. Room
 - July 30; 12 – 1:15 p.m.
 - Larson Justice Center
 - This is an informal gathering to network, socialize, and debrief on your mediations. Please RSVP to CourtADRDIRECTOR@riverside.courts.ca.gov
- **Save the date: September 27, 12 – 1:30 p.m. – Indio**
September 28, 12 – 1:30 p.m. – Riv.
MCLE Program: Mediation and Ethics
 - Recent case law
 - Disclosure Requirements**Presenter: Carl Ingwalson, Jr.**

parties at market rates pursuant to a written agreement signed before the mediation began.

Pre-mediation services include:

- Conflicts checks
- Confirming parties' completion of necessary discovery and motions before the session
- Scheduling
- Submitting court forms
- Review of mediation briefs
- Background discussions and correspondence
- Confirming mediations and attendance by all necessary participants, including insurance representatives, 48 hours in advance of the scheduled session.

Purpose

The new policy is intended to encourage investment in pre-mediation activities that promote settlement and to acknowledge the time required to fulfill the program's administrative requirements.

Notice to Parties/Counsel

The [Information Sheet for Parties/Counsel](#) has been revised to state this new policy, but please give your own notice, as well, through December 2010.

Stipulation re Fee For Ongoing Services

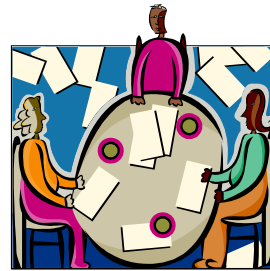
This form has been revised and will be posted shortly.

Effective immediately:

You may apply either the new or old policy on a case-by-case basis, at your discretion, after confirming that the parties have notice of your policy. ♦

New ADR Workshops for Pro Pers

[Click here for flyer.](#)



Mediations with pro per parties can be challenging, from scheduling to staying neutral to getting to yes. To prepare pro pers for mediation, MSC's, and settlement discussions in general, there will be a pilot program of ADR Workshops in July, at Historic.

Education

The Workshops provide basic information on ADR, mediation and settlement agreements so mediators can focus more on the mediation itself.

Referrals

If you have mediations scheduled with pro per parties this summer or fall, simply give them the attached flyer and encourage them to attend. If any side is represented, please notify counsel that you have done so. Represented parties are also welcome to attend these workshops.

July & beyond

Stay tuned for news about the pilot program and future workshops countywide. ♦



Recent Local Press

["Mediation Making Impact on Courts" Richard K. De Atley](#), (3/3/10 – front page-Riverside Press Enterprise)

["Riverside's Court-Ordered Mediation Program: A Bench Bar Partnership,"](#) (Riverside Lawyer, March 2010.) This article describes the benefits of the Court's program and why pre-mediation preparation by attorneys and parties is key.

Please distribute articles to parties/counsel. ❖

Recent Mediation Case Law



Mediators: For summaries of recent important cases, visit <http://www.cdrc.net/pg1036.cfm>

Please pay special attention to these cases:

Campagnone v. Enjoyable Pools & Spa Service & Repairs, Inc. (2008) 163 CA4th 566

A party, but not a mediator, may report conduct that may be the basis for sanctions, including unauthorized failure to attend a mediation.

Consider this case before submitting SAN's with "too much information."

Porter v. Wyner (2010) 183 Cal.App.4th 949.

Communications between an attorney and client during mediation are not protected by mediation confidentiality (Evidence Code Section 1119) and were admissible in a subsequent action between the client and lawyer. ❖

If the parties request a settlement conference or mediation before starting the arbitration:

1. Remind parties of the prohibition against ex parte communications/private caucuses with the arbitrator. ([CRC 3.820](#)).
2. Advise parties to consider filing a stipulation to transfer the case to private or court-ordered mediation.
3. Review this recent Daily Journal article on the perils of "mediation-arbitration": http://www.arc4adr.com/puff_dragon.html
4. Enter into a written stipulation specifying which ADR process will be used; the applicable confidentiality codes; agreements as to what information from the talks may be used in determining the Award; and the parties' right to select a new arbitrator if the case does not settle. Note that the court will only compensate one neutral per case, based on an Award or Notice of Settlement.

If you have assisted the parties in settling a case that was ordered to arbitration, you may submit an Arbitrator's Fee Statement stating the date the Notice of Settlement was filed. ❖

March 2010 "ADR Week"

March 18 Recognition Ceremony

Program and listing of panel members. – [click here](#)

Judicial Council Standing Resolution re Mediation Week. – [click here](#)

Court's Volunteer Attorney Proclamation. – [click here](#)

Bar Events

Many thanks to panel members John A. Babcock, Madeline Tucci Tannehill and Jay S. Korn for their enlightening presentations on "Court-Connected Mediation" at the March 12th General Membership Meeting. ❖

PANELISTS' PAGE



Mediating in a Bad Economy

By Lori B. Sanford

Reality Check

Mediating a case these days is difficult. In law school, we were taught that proper compensation in a tort case required making the plaintiff whole, or in a breach of contract case, it was the amount owed on the contract. In reality, the first query should be "Is the Defendant solvent?"

Be Creative

Resolving a dispute now requires ingenuity because of hard economic times. Often, a lump sum cannot be offered, and payment plans can be burdensome if spread over a long length of time between parties that do not trust each other. What I find works best is to hear both sides of the story, and then I work very hard to find some common ground. Perhaps it is an agreed upon dollar amount, or a discussion about the reality of a party's financial position. Resolving a case can lead to an exchange of anything of value, such as a vehicle, a parcel of land, or money. The item of value can be a resolution of the lawsuit, and the ability to move on with one's life.

Come up with Options

Often, both sides want options and the more options available the harder the parties work to resolve the dispute. The unfortunate alternative is to remain on the clogged civil calendar. Thus, I find that mediating as a neutral involves insight into today's reality, and a push to accomplish something right then and there at the mediation. ❖



Mediator Tip: "If the case doesn't settle at mediation, send the parties a letter with your recommendation. I did so, and the case settled for my recommended amount."

-- John Maselter

Medical Malpractice Mediation

The Most Important Thing: Getting the Parties to Talk

By Lawrence J. Rudd, M.D., J.D.

Over 80% of medical malpractice cases which go to trial result in a defense verdict. Yet, there are attorneys who have made a successful professional career representing plaintiffs against their health care providers. How can this be when experts charge \$500 or more to review medical records and between \$5,000 and \$10,000 per day to testify at trial making these cases very costly to litigate in the face of MICRA's limit on the recovery? The simple answer is the statistic mentioned in the first sentence, while correct, is skewed because many medical malpractice cases settle before trial.

The Value of Experience

Cases which, based upon the facts and medical science demonstrate a reasonable likelihood the plaintiff may prevail, are detoured before trial by knowledgeable defense attorneys and risk averse insurance companies. Reasonable plaintiff attorneys, especially those with significant experience in this field, experience which will almost certainly include being on the losing end of a case which "should have" resulted in a plaintiff's verdict, understand the risks and costs of trial and together with opposing counsel will negotiate in good faith and get cases settled.

The trick is then dealing with those cases which end up in trial.

The Costs of Winning or Losing

On the plaintiffs' side, settling those cases would represent a far, far better outcome than the jury's verdict. While jury validates the defense's position in the majority of cases, it can still be a costly win, a win which for any number of reasons could have ended up an even more costly loss. The goal of the court system, in conjunction with its colleagues in ADR, is to do whatever it can to bring these "trial" cases to the negotiation table, offering a much better outcome for at

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least one of the litigants. While this may be easier said than done, you never know until you try.

Consent: An Important Issue That Often Slows or Precludes Settlement.

Unlike most other insurance defense cases, the doctor, dentist, or other individual health care provider may withhold consent to settle. This may be the elephant in the room when defense counsel and the insurer have an interest in resolving the case. It may be fair to say that in almost every case consent is withheld early but events may change this along the way. The defendant's position on settlement may change after discussions with counsel, following unsupportive expert review, or after concessions obtained during the defendant's deposition.

Consent Issues with Multiple Defendants

In instances where there are multiple defendants, consent may not be an issue with one or more, yet a single defendant withholding consent may preclude settlement, the non-consenting defendant convincing the others of the "strength in numbers" theory. While it may be true that there can be strength in numbers, not all parties evaluate the case in the same fashion and thus their assessment of their own risk may be different from that of others. Often times an offer can be fashioned such that the first defendant to accept it can obtain a bit of a discount. This may lead to domino effect leaving the non-consenting defendant on their own, eventually agreeing to enter resolve the case.

Additionally, more often than not the prospective liability is not the same for all defendants and the right offer to one defendant may break the block, leading to consent from the previously intransigent health care provider. In some instances it is none of these factors that result in settlement, but the only the hard realization that the trial date is soon approaching.

Plaintiffs' Evolving Views on Settlement

The same is true on the plaintiff's side. Even without regard to their position on liability, changes in their views on economic damages may change the plaintiff's outlook. This, along with a more solid understanding of the defense's economic analysis, may make what was once a wide gap to be bridged, somewhat closer. The suggestion of periodic payments through an annuity, growing tax free and providing a stream of income

reflecting the plaintiff's economic needs may also aid in bringing new life to the idea of settlement. It is important to understand that litigation is not static, it is ever changing and while the parties may not agree to mediate at one point in time it may lead to a settlement at another.

Give The Parties Every Opportunity To Realize That Settling The Case Is Better Than A Trial.

It has always been my belief that one of the most important things the court does to help resolve a case is to set the trial date. With rare exceptions, that is the end point of negotiation. Understanding that expensive expert discovery begins 50 days before trial, there is added impetus to resolve those cases before that begins, understanding that most experienced medical malpractice litigators know what the other side's experts are going to testify to in deposition. So, getting the sides talking about settlement, something important at all stages of the litigation, should be stressed in the 90-120 days before trial.

While the court cannot order most of these cases to mediation because the amount in controversy is greater than \$50,000, the court can "strongly suggest" mediation as an alternative to something the court can order, a mandatory settlement conference. The benefits of a mediation over a mandatory settlement conference are multiple: it can be held in a location more convenient for the parties, it can be held at a time of the parties' choosing rather than a date/time set by the court, often more time can be allotted by the mediator than a judge, allowing for some softening of the parties' positions and, a mediator with extensive experience in medical malpractice may be selected. The Court's Civil Mediation Panel includes mediators who are available to assist in settling medical malpractice cases.

"You never know unless you try" should be firmly in the minds of the litigants and the court. Surprising results may come from just a nudge toward mediation by the court. You never know unless you try. ❖

Panel Members:

Submit your responses, questions and articles for the Panelists' Page to CourtADRDIRECTOR@riverside.courts.ca.gov

PROGRAM ADMINISTRATION



Pop Quiz for Mediators: Forms

1. Question: What do these situations have in common?

- The case settled at mediation
- The case didn't settle at mediation
- The case settled before mediation
- Mediation started; case probably will settle but after completion date
- Party declared bankruptcy
- Party never scheduled session
- Party didn't appear at session

Answer: The mediator must file the [Statement of Agreement or Non Agreement](#) (SAN) within 10 days after the mediation completion date, in all these cases! Why? (a) It's a mandatory Judicial Council Form for court-ordered mediations; (b) It triggers the next step, Trial Setting or OSC (dismissal/failure to complete); (c) It allows the court to keep track of cases ordered to mediation and to capture statistics.

So, even if everyone knows whether or not the case settled, it is very important to submit your SAN!

2. [Notice of Acceptance or Recusal](#)

True or False: Mediators must file a Notice of Acceptance or Recusal when

- a. ____ The court assigns them a court-ordered mediation.
- b. ____ When parties file a Response stipulating to him/her.

Answers

2a. True

2b. True

Address Changes

Panel Arbitrators & Mediators

If your address changes, please

Submit the [Payee Data Change form](#) and

E-mail your new contact information to
CourtADRDIRECTOR@riverside.courts.ca.gov

Mediation Statistics

- Jan – June 30, 2010: 122 cases reported as fully settled
 - 157 Surveys received April '09 – May '10
- Mediation experience good/excellent 87%
- Process was fair: 79%
- Why case didn't settle:
- Mediator's lack of expertise: 0
- Opposing side's lack of cooperation: 42%

[New Info Sheet for Mediators](#)